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No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,

v

JOHN HELLERSTEDT, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR CONCERNED WOMEN FOR AMERICA AND SUSAN B. ANTHONY LIST AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Question 1.a: Whether the Court should overturn *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), by allowing courts to override legislative determinations about disputed medical evidence, rather than adhering to the doctrine that an abortion regulation is valid if it has a rational basis and does not impose a substantial obstacle to abortion access.

Question 1.b: Whether the challenged laws are invalid facially or as-applied to an abortion clinic in El Paso.

Question 2: Whether res judicata bars petitioners' facial challenges.

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INTEREST OF *AMICI CURIAE*[1]

Concerned Women for America (CWA) is a 501(c)(3) organization, headquartered in Washington, D.C. CWA is the largest public policy women's organization in the United States, with approximately 500,000 members from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families, and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the intrinsic value of every human life from conception to natural death, including the life and well being of every woman in America.

Susan B. Anthony List (SBAL) is a 501(c)(4) organization incorporated in the Commonwealth of Virginia. Founded in 1992, SBAL works to advance the priorities and electoral prospects of candidates who champion human life and oppose abortion, and promote the health and safety of all women as well. Named for the famous suffragette whose work was instrumental in securing women's equality through enfranchisement, SBAL's 365,000 members, found in all 50 states and

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[1] Kenneth A. Klukowski authored this brief for *amici curiae*. No counsel for any party authored this brief in whole or in part, and no one apart from counsel's organization (the American Civil Rights Union) or *amici curiae* made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief.

Washington, D.C., share the conviction of Alice Paul, the woman who authored the 1923 Equal Rights Amendment, who proclaimed, "Abortion is the ultimate exploitation of women."

Amici are represented by an attorney from the American Civil Rights Union (ACRU), a 501(c)(3) legal policy organization active in Washington, D.C., dedicated to educating the public on constitutional government and supporting litigation that will advance and restore principles enshrined in the U.S. Constitution. The policy board of the ACRU includes such constitutional conservative leaders as former United States Attorney General Edwin Meese III, former Assistant Attorney General Charles J. Cooper, former Assistant Attorney General William Bradford Reynolds, and former Ambassador J. Kenneth Blackwell. The ACRU is representing *amici* here to advance an originalist understanding of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Under the rule from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as followed by *Gonzales v. Carhart*, 550 U.S. 124 (2007), a statute restricting abortion is constitutional so long as it has a rational basis, and additionally does not impose an undue burden on women seeking an abortion. *Casey* held in part that States have an interest "in protecting the health of the woman."

The Court's precedents hold that abortion restrictions to protect the health of women seeking

abortions are not any form of sex discrimination. The Court has repeatedly rejected arguments that such restrictions discriminate against women as a protected class in violation of either the Fourteenth Amendment's Equal Protection Clause or federal civil rights statutes. The fact that only women can become pregnant and have an abortion does not mean that laws impeding abortions discriminate against women as women. Since only a fraction of women are impacted by abortion laws, such laws would be significantly underinclusive if construed as sex-based laws.

Instead, Texas's HB2 is a typical police-power law, predicated upon the State's traditional power and general jurisdiction to enact laws promoting and safeguarding public health and public safety. Texas law otherwise permits abortions to be performed at hospitals and ambulatory surgical centers (ASCs). HB2 requires that abortion facilities must meet the standards for quality of care that ASCs must provide, in terms of sanitation, sterilizing equipment, fire prevention, staffing, and other typical healthcare regulatory requirements to protect patient health. Requiring doctors to be able to accompany abortion patients to a nearby hospital in the event of an emergency likewise protects that woman's health, as well as the integrity and ethics of the medical profession.

HB2's requirements ensure that women seeking an abortion will receive healthcare that is of equal quality to the healthcare men receive. Women in Texas undergoing an abortion at an abortion clinic will have the same standard of care that a man in Texas would

have at an ASC. Various national medical organizations, and even one major abortion-rights organization, have supported laws requiring abortion-providing doctors to have admitting privileges at nearby hospitals. Because HB2 ensures this equality, invalidating HB2 would actually effectuate discrimination against some women, instead of preventing sex-based discrimination.

Those points notwithstanding, even if the Court subjected HB2 to the standard established by the Equal Protection Clause for quasi-suspect classes, HB2 would still pass muster because it satisfies intermediate scrutiny. Like any type of heightened scrutiny, laws subject to intermediate scrutiny are presumptively invalid, and the government must show a sufficient evidentiary basis as it carries its burden. State action satisfies intermediate scrutiny if it is substantially related to promoting an important public interest.

Those elements are satisfied here. Texas considered extensive testimony and other evidence when crafting HB2 that are more than sufficient to satisfy intermediate scrutiny, and presented this evidence to the courts in this litigation. Protecting women's health is not merely an important government interest, it is instead a compelling interest. Statutory provisions requiring abortion facilities to meet the health and safety standards of general medical facilities in which surgical procedures are performed are substantially related to protecting women's health. Requiring the doctor performing the abortion to be able to remain with the woman during an emergency, providing uninterrupted care and without having to work

through an intermediary, is likewise substantially related to protecting women's health.

HB2 thus passes constitutional muster both under *Casey* and under the Court's equal-protection jurisprudence. The judgment below must accordingly be affirmed.

ARGUMENT

Laws restricting abortion are governed by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), with particular emphasis on the Court's most recent application of *Casey* in *Gonzales v. Carhart*, 550 U.S. 124 (2007).[2] Under *Casey*, a statute restricting abortion is constitutional so long as it has a rational basis, and additionally does not impose an undue burden on women seeking an abortion. *Casey*, 505 U.S. at 877.[3] The rational-basis requirement is satisfied when the statute "is rational and in pursuit of legitimate ends," *Carhart*, 550 U.S. at 166, a standard

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[2] This Court's precedent confirms that *Casey*'s joint opinion authored by Justices O'Connor, Kennedy, and Souter controls here. *See Carhart*, 550 U.S. at 156 (applying the rule from the *Casey* plurality as controlling). This approach is consistent with the Court's general rule for determining which opinion controls for decisions not accompanied by a majority opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation and editing marks omitted)).

[3] All citations to *Casey* are to the joint opinion of Justices O'Connor, Kennedy, and Souter, often designated as the plurality opinion by many cases and authorities.

that is discussed further in Part II, *infra*. The second prong of *Casey*'s test asks whether the statute has the "purpose or effect of placing a substantial obstacle in the path of a woman" seeking an abortion. *Casey*, 505 U.S. at 877 *Casey*'s undue-burden test supplanted and displaced the strict-scrutiny standard adopted in *Roe v. Wade*, 410 U.S. 113 (1973), as one of the authors of *Casey* later made explicit. *Stenberg v. Carhart*, 530 U.S. 914, 960 (2000) (Kennedy, J., dissenting).

Texas adopted a law regulating abortion in 2013. Act of July 12, 2013, 83d Leg., 2d C.S., ch. 1, 2013 Tex. Gen. Laws 5013 (House Bill 2, or HB2). This statute passes constitutional muster under the Court's abortion jurisprudence as well as the Court's equal-protection jurisprudence.

I. HB2 IS A POLICE-POWER STATUTE THAT PREVENTS DISCRIMINATION AGAINST WOMEN.

The Court held in *Casey* "that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Casey*, 505 U.S. at 846. In *Gonzales*, the Court reaffirmed one of those central premises—"that the government has a legitimate and substantial interest in preserving and promoting fetal life"—in upholding the federal ban on "partial-birth abortion." *Gonzales*, 550 U.S. at 145.

This case requires the Court to adhere to the other interest recognized by *Casey* in the passage quoted above: the State's interest "in protecting the health of the woman." HB2 safeguards women's health and safety, and reversing the Fifth Circuit here by invalidating the challenged provisions of HB2 would

effectively overrule this part of *Casey*'s holding. The impact on *Casey* would be to upset "[t]he balance [that] was central to its holding." *Id.* at 146.

Moreover, the manner in which HB2 protects women's health also prevents discrimination against women. As a consequence, invalidating the challenged provisions of HB2 would open the door to discrimination against women, subjecting women to healthcare that is of inferior quality to that enjoyed by men in the State of Texas.

A. HB2 is not sex discrimination.

1. Abortion laws do not discriminate on the basis of sex. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), was a case involving private individuals working as a group to impede access to abortion clinics. *Id.* at 266–67 Abortion providers pursued an action against these private actors, under Rev. Stat. § 1980, codified at 42 U.S.C. § 1985(3), alleging a conspiracy to deprive members of a protected class (namely, women) of their civil rights. *Id.* The Court held that such actions in organized opposition to abortion, and thereby attempting to impede abortion, did not target women as a protected class: "Whatever may be the precise meaning of a 'class' for purposes of extension of § 1985(3) beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors." *Id.* at 269. In so holding, the Court plainly rejected a contrary argument that was advanced by a single dissenting Justice: "A statute that involves a defining characteristic or a biological correlate of being female should be treated in precisely the same way." Cass R.

Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 32 (1992), *quoted in Bray*, 506 U.S. at 323 n.20 (Souter, J., dissenting).

The fact that *Bray* concerned a federal civil rights statute is immaterial to this case. The salient point is that abortion providers in that case were asking the Court to recognize women as a protected class under the statute, and the Court's declining to do so was not predicated on anything pertaining to the statute. *See Bray*, 506 U.S. at 268–74.

2. This is consistent with the Court's first relevant discussion of special protections for women under the Fourteenth Amendment, where the Court rejected the claim that laws involving pregnancy trigger heightened scrutiny under the Equal Protection Clause, as would be the case if laws pertaining to pregnancy discriminated against women per se. "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

The Court has held that a law denying funding to indigent women seeking an abortion did not thereby discriminate against women as a suspect class. *Maher v. Roe*, 432 U.S. 464, 470 (1977). Specifically, the Court held that indigent women seeking an abortion are not any type of suspect class. *Harris v. McRae*, 448 U.S. 297, 323 (1981); *Maher*, 432 U.S. at 464, 470–71. Nothing in either of those decisions involving restricting public funding for abortions suggests that the economic disadvantage of the women seeking an abortion was the reason that heightened scrutiny did

not apply. Instead of socioeconomic status, the Court's discussion in both cases revolved around the financial implications entailed by having an abortion. *See Harris*, 448 U.S. at 322–24; *Maher*, 432 U.S. at 469–74. The Court explicitly rejected equal-protection challenges brought against these funding restrictions, subjecting the law in question to rational-basis review. All this, notwithstanding the context created by the Court's having recently invalidated a law burdening women as such, *Reed v. Reed*, 404 U.S. 71 (1971), and then subsequently designating women as a class enjoying heightened protection under the Equal Protection Clause, *Craig v. Boren*, 429 U.S. 190, 197 (1976). It would be passing strange if the Court repeatedly rejected heightened scrutiny claims involving abortion solely because funding was involved, but never cabined its holdings in *Maher* and *Harris* by making clear that, but for the funding component, intermediate scrutiny would otherwise have attached.

3. Moreover, statutes that restrict abortions cannot be considered statutes that target women as a biological sex because such a ruling would render HB2 underinclusive. According to the 2010 census, at that time there were approximately 12.7 million women in Texas.[4] But only 5,326,162 women were of reproductive age, J.A. 921–22, who are the only ones who can be impacted by a law making it more difficult to procure an abortion. Moreover, under HB2, over 86% of women of reproductive age in Texas would still live within 150 miles of a clinic that provides abortions,

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[4] U.S. Census Bureau, 2010 Census Briefs, *Age and Sex Composition: 2010*, at 7, *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf.

including several clinics in major metropolitan areas. Texas Br. 45 & n.19; *see also* J.A. 921–22, 1435–36.

HB2 regulates service providers, both men and women, who are performing a medical procedure on patients. This particular procedure is of a nature that only women seek to obtain it, but that does not transform this medical-regulatory statute into sex discrimination, just as other procedures are sought only by men, and regulations on those providers do not discriminate against the male sex. For example, approximately 5% of men of reproductive age obtain a vasectomy.[5] A statute regulating medical providers performing vasectomies would not discriminate against men; fully 95% of men would be completely unaffected. HB2 only impacts a fraction of women in Texas, not women as a group, just as a statute regulating doctors performing vasectomies would only impact a fraction of men. Alleging that either type of statute is sex discrimination fails, because the statutes are underinclusive. HB2 does not conform to the Court's precedents regarding the definition of a statute that discriminates on the basis of biological sex.

B. Texas's HB2 is a police-power statute focusing on public health.

Rather than a law that discriminates on the basis of sex, HB2 is instead a conventional law predicated upon Texas's police power. Every State has police power, which is the power to make laws pertaining to "public health, public safety, and morals." *Barnes v. Glen*

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[5] Cleveland Clinic, Treatments & Procedures, What is a Vasectomy, https://my.clevelandclinic.org/health/treatments_and_procedures/hic_Vasectomy (last visited Feb. 2, 2016).

Theatre, 501 U.S. 560, 569 (1991).[6] A statute establishing requirements for sanitation, equipment, and personnel credentials at locations performing medical procedures is an archetype of a public-health law, accompanied by other provisions that implicate public safety as well.

Texas law permits abortions to be performed at hospitals, abortion facilities, and ambulatory surgical centers. TEX. HEALTH & SAFETY CODE §§ 245.003, 245.004; TEX. ADMIN. CODE § 139.1(b). Under HB2, the physician performing the abortion must "have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced." TEX. HEALTH & SAFETY CODE § 171.0031(a)(1).

Texas statutory requirements for ambulatory surgical centers (ASCs) are sex-neutral public health requirements that fall squarely within the State's police power. ASCs must satisfy requirements regarding: (1) staffing, training, patient safety, and sterilizing equipment and treatment areas, TEX. ADMIN. CODE §§ 135.4–.17, 135.26–.27; (2) safety standards, including measures for preventing, fighting, and responding to fires, *id.* §§ 135.41–.43; and (3) standards for facility features, *id.* §§ 135.51–.56. Dr. Linda Flower testified before the Texas legislature for a previous version of HB2 that the ASC provisions "keep the patients safe," through measures such as

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[6] This is in contradistinction to the federal government, which as a government of limited and enumerated powers under the Constitution has no police power. *United States v. Morrison*, 529 U.S. 598, 618 (2000).

requiring backup generators in the event of loss of electrical power.[7]

Moreover, Texas "has an interest in protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). Performing abortions under unsanitary conditions or in inferior facilities, resulting in life-threatening complications or preventable serious injuries to women, damages the reputations of doctors performing abortions and calls into question their adherence to medical ethics. Performing an invasive surgical procedure without being able to maintain continuity of care in the event of complications, because the doctor cannot continue to manage the medical response at a nearby hospital, likewise casts a cloud of doubt on whether the doctor is upholding the highest standards of the medical profession. A State's police power gives it an interest in protecting the integrity and ethics of abortion providers by eliminating these concerns.

The challenged provisions of HB2 are thus public-health measures enacted pursuant to Texas's police power. As such, they have a rational basis, and furthermore do not have the purpose or effect of imposing a substantial obstacle on women seeking an abortion. It is not any form of sex discrimination.

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[7] Hearing on SB537, S. Comm. Health & Human Servs., 83d Leg., R.S. at 1:28:20–1:28:54 (Mar. 19, 2013), *available at* http://tlcsenate.granicus.com/MediaPlayer.php?clip_id=842.

C. If anything, HB2 precludes gender discrimination by ensuring that women receive healthcare that is of equal quality with healthcare afforded to men, so invalidating HB2 would effectuate discrimination.

By ensuring that women seeking an abortion receive medical care that is equal in quality to the medical care provided to men, HB2 prevents discrimination against those women. To the extent challengers to HB2 might suggest HB2 is a form of sex discrimination, it is actually a statute that *prevents* discrimination. As such, invalidating HB2 would carry the opposite consequence of effectuating discrimination against women.

HB2's ASC provision commands that "the minimum standards for an abortion facility must be equivalent to the minimum standards for ambulatory surgical centers." TEX. HEALTH & SAFETY CODE § 245.010(a). Only women are patients at abortion facilities, but ASCs treat both women and men. This provision thus ensures that the women at one facility are entitled to the same quality of care that men at the other facility receive.

One expert Texas cites in its brief provided testimony to lawmakers saying as much. Referring to the ASC provision in a previous version of HB2, Dr. Pat Nunnelly informed legislators that this provision would "hold abortion providers to the same standard of care that I am held to when I do a [dilation and curettage (a common abortion procedure)] or multiple other surgical

procedures in the hospital."[8] The statute therefore ensures that a woman seeking an abortion receives healthcare of the same quality of that which men enjoy in Texas hospitals. Invalidating the ASC provision would subject women throughout Texas to medical care inferior to that provided to their male counterparts.

Texas's commitment to preventing discrimination against women seeking an abortion goes so far that lawmakers forbid hospitals from discriminating against doctors on the basis that a doctor is willing to perform an abortion. TEX. OCC. CODE § 103.002(b). This ensures that the doctors who perform abortion on women are not professionally inferior in training or experience to doctors who perform procedures on men.

Texas balances these requirements with another provision specifying that HB2's requirements do not apply in a situation where abortion is necessary to prevent death or permanent physical injury. TEX. HEALTH & SAFETY CODE § 245.016. Doctors must have great latitude in how they may respond during a medical emergency, and HB2 ensures that women experiencing emergency complications during an abortion can know that the doctor performing the procedure will have the same latitude to respond that a doctor performing any number of procedures on men possesses.

The National Abortion Federation argued that for the sake of women's health, when a woman is having an abortion, it is imperative that her physician, "'[i]n

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[8] Hearing on SB5, SB24, S. Comm. Health & Human Servs., 83d Leg., 1st C.S. at 3:20:25–3:20:40 (June 13, 2013), *available at* http://tlcsenate.granicus.com/MediaPlayer.php?clip_id=525.

the case of emergency[,]' can 'admit patients to a nearby hospital (no more than 20 minutes away).'" *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 595 (5th Cir. 2014) (quoting Nat'l Abortion Fed'n, *Having an Abortion? Your Guide to Good Care* (2000)) (first alteration in original). It is implausible to suggest that a major abortion-rights organization was advocating such a requirement as a form of deliberate discrimination against women. To the contrary, it is further proof that advocating women's having access to top-tier medical care in case of an emergency ensures that women receive the same healthcare as men. Therefore invalidating HB2 would subject women to second-class medical treatment, thus effectuating discrimination against women seeking an abortion.

II. EVEN IF HB2 TRIGGERED HEIGHTENED SCRUTINY, IT WOULD STILL BE CONSTITUTIONAL UNDER INTERMEDIATE SCRUTINY.

As discussed in Part I, laws restricting abortion are subject to the undue-burden test from *Casey*. The Court has held that the right to obtain an abortion is a substantive right situated in the Fourteenth Amendment's Due Process Clause, U.S. CONST. amend. XIV, § 1, cl. 3. *Casey*, 505 U.S. at 846. Such burdens do not arise under the Fourteenth Amendment's Equal Protection Clause, U.S. CONST. amend. XIV, § 1, cl. 4, the constitutional provision that guards against sex discrimination. Nevertheless, in the course of verifying that HB2 does not discriminate against women, examining this Court's precedents governing such inquiries is illuminating, and confirms that even if HB2 triggered the protections afforded to a protected class,

it would still satisfy the demands of the Equal Protection Clause.

The overarching principle arising from the Equal Protection Clause is that similarly situated individuals should be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Many laws impact different people in different ways, so most laws are subject to rational-basis review, under which the law need only be rationally related to any legitimate public interest. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993).

Some laws, however, trigger some form of heightened judicial review, the most demanding of which is strict scrutiny. Strict scrutiny applies when a law discriminates on the basis of a suspect class such as race. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).[9] State actions subject to strict scrutiny will be upheld only if they are narrowly tailored to achieve a compelling public interest. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013).

Other laws trigger a form of heightened scrutiny that is less demanding than strict scrutiny, a form typically referred to as intermediate scrutiny Under intermediate scrutiny, the challenged law must be substantially related to an important public interest. *Craig*, 429 U.S. at 197. The ends pursued must be greater than the legitimate interests of rational-basis

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[9] Strict scrutiny can also attend certain types of burdens on fundamental rights. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). But as this brief examines whether HB2 creates an equal-protection violation, *amici* limit their discussion of strict scrutiny to the context of suspect and quasi-suspect classes.

review, but need not be the compelling interests of strict scrutiny. And the means employed to pursue those ends must be more carefully crafted than being merely rationally related to those ends, but need not be so carefully calibrated that they can be called narrowly tailored.

Biological sex is a quasi-suspect classification subject to intermediate scrutiny. *United States v. Virginia*, 518 U.S. 515, 533 (1996). The purpose of such heightened protection under the Equal Protection Clause is to ensure women enjoy "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *Id.* at 532. Sex is not a fully suspect class such as race, because while the law now recognizes that there are no inherent differences that government should recognize based upon skin color, the law does recognize certain inherent differences between men and women that require sex to be evaluated by a different standard than race. *Id.* at 533.

If the Court were to apply the level of scrutiny applicable to sex discrimination, or alternatively if the Court were to overrule its precedents by engrafting any aspect of sex-discrimination jurisprudence into abortion-rights jurisprudence, HB2 still must be sustained. The Court in *Casey* rejected strict scrutiny as the standard for burdens on abortion rights. *Stenberg*, 530 U.S. at 960 (Kennedy, J., dissenting). More than that, although *Casey*'s undue-burden test is more demanding than the rational-basis test, it is also less stringent than the intermediate scrutiny that attends laws that discriminate on the basis of sex.

There are four parts to an intermediate-scrutiny analysis, each examined below: (A) When heightened scrutiny is triggered—whether strict or intermediate—the law is presumed invalid, so the burden shifts to the government. (B) The government must have some sort of evidentiary basis for its factual determinations. The law (C) must concern an important government interest, and (D) must be substantially related to promoting that interest.

A. The State of Texas has carried its burden.

Most laws are subject to rational-basis review when examined under the Equal Protection Clause. Courts acknowledge a "strong presumption of validity" when examining a statute under the rational-basis test. *Heller*, 509 U.S. at 319.

However, courts presume the challenged law is invalid when examining a statute under heightened scrutiny. *Virginia*, 518 U.S. at 532. Accordingly, when courts apply some form of heightened scrutiny—strict or intermediate—the burden shifts to the government. *Fisher*, 133 S. Ct. at 2418. Rather than the challenger proving that the ends pursued or the means employed by the government violate the Constitution, when heightened scrutiny is at bar, the government must prove both that the interests it is advancing and the means it is utilizing satisfy the requisite standards of the applicable level of scrutiny.

Texas has carried its burden in this litigation. For the reasons explained in Parts II.B–D, *infra*, the Texas Attorney General has properly shown to the courts below, and to this Court, that Texas's legislators had a sufficient evidentiary basis to arrive at the findings

undergirding HB2, and that HB2 is substantially related to advancing an important government interest (and indeed, a compelling one).

B. Texas lawmakers had a sufficient basis in evidence for their factual findings.

Courts afford varying levels of deference to legislatures regarding legislative factual findings. The level of deference is dictated by the level of scrutiny attending the challenged measure. When applying rational-basis review, courts do not require an evidentiary basis from lawmakers, and instead are broadly deferential to legislative policymaking. *See, e.g.*, *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656–57, 672 (1981). But when heightened scrutiny is implicated, legislative findings and reasoning must rest on more than "mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

The Court has required the government to have a "strong basis in evidence" supporting the State's chosen means in order to satisfy the narrow-tailoring prong of strict scrutiny. *See, e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). While courts do not give broad deference to lawmakers when applying intermediate scrutiny, it is nonetheless not as demanding as strict scrutiny, so some limited deference is appropriate. *See Shelby Cnty. v. Holder*, 679 F.3d 848, 861 (D.C. Cir. 2012) (citing *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997)), *rev'd in part on other grounds*, 133 S. Ct. 2612 (2013).

The Court has never had occasion where it has needed to clearly specify the lesser evidentiary

standard required under intermediate scrutiny. The requisite evidence must be "something less than the 'strong basis in evidence' required to bear the weight of a race- or ethnicity-conscious program," *Eng'g Contractors' Ass'n v. Metro. Dade Cnty.*, 122 F.3d 895, 909 (11th Cir. 1997), when applying strict scrutiny. Given that rational-basis review requires no evidence, it is likely the State must consider some evidence akin to substantial evidence for factfinding under the Administrative Procedure Act. Kenneth A. Klukowski, *Making Second Amendment Law with First Amendment Rules: The Five-Tier Free Speech Framework and Public Forum Doctrine in Second Amendment Jurisprudence*, 93 NEB. L. REV. 429, 480 (2014). Only some form of minimal evidentiary standard—such as substantial evidence—is compatible with *Carhart*. There, the Court held that facial challenges to abortion restrictions fail when medical evidence is contested. *Carhart*, 550 U.S. at 164.

Courts generally do not infer a discriminatory motive. *McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987). Consistent with this general rule, courts should not look with a jaundiced eye at a statute whenever a challenger asserts that a measure is discriminatory. Courts should consider legislative judgments in an evenhanded manner when applying intermediate scrutiny, especially in a context such as this one, in which public health and public safety are policy matters traditionally governed by the States.

It bears repeating that this is all in the context of applying a hypothetical intermediate-scrutiny analysis, but that this Court has made clear that the *Casey* standard is less stringent than intermediate scrutiny.

For example, in *Mazurek v. Armstrong*, 520 U.S. 968 (1997), the Court sustained a law prohibiting non-physicians from performing abortions, notwithstanding the evidence in the record indicating that a physician assistant was capable of performing abortions safely. *Id.* at 973 (per curiam). In that case, no evidence was presented supporting the legislature's finding that only physicians could safely perform abortions, *see id.*, just as there was no evidence presented sustaining Pennsylvania's informed-consent requirement that the Court upheld in *Casey*, 505 U.S. at 884–85.

But Texas lawmakers went above and beyond what was required by the Constitution, considering a significant amount of evidence, which the Texas Attorney General later presented during litigation. The evidence submitted in the district court was that "the rigorous scrutiny of both the doctor's qualifications and his/her technical skills" is sufficient for abortion-related matters. J.A. 867–68. Additionally, testimony was offered that requiring admitting privileges "improves doctor-patient continuity of care because hospital staff privileges mandate standards of accessibility and availability of the doctor." *Id.* at 868. This is significant because "[t]reating patients without complete information poses an important challenge to patient safety, increasing the likelihood of medical errors, adverse events, duplication of laboratory tests and procedures, and increased health care costs." *Id.* at 892–93.

Additionally, Texas put forth evidence regarding medical complications that can arise from abortions. These include bleeding, infection, and perforations of the uterus. *See id.* at 849–52 (testimony of Dr. Mayra

Jimenez Thompson). Texas also presented statistical data regarding complications. *See, e.g.*, *id.* at 266–67 (citing the "major complication rate" of 0.23% and the fact that there are 60,000 abortions in Texas per year to conclude that every week up to three women in Texas would experience major complications). The State also cited expert testimony regarding such complications, *see, e.g.*, *Abbott*, 748 F.3d at 591–95 (testimony of Drs. James Anderson, Paul Fine, Mikeal Love, and John Thorp).[10] Texas also presented evidence that these complication rates are underreported, either due to States that do not require reporting, or coupled with abortion providers' incentive not to report negative outcomes. J.A. 844, 870–72. Texas also brought to the lower courts' attention that the American Medical Association and American College of Obstetricians and Gynecologists issued a joint statement in 2004 recommending that all physicians performing surgical procedures in their offices should have admitting privileges at a nearby hospital. *See Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 928 & n.3 (7th Cir. 2015) (Manion, J., dissenting) (quoting statement).

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[10] It should be noted that testimony was also heard by doctors who do not believe HB2's provisions are medically necessary. *See, e.g.*, *Abbott*, 748 F.3d at 591–93 (testimony of Drs. Jennifer Carnell, Paul Fine, and Darrell Jordan). The fact that there was conflicting testimony is not problematic for Texas. In *Carhart*, the contentions of the doctors supporting the partial-birth abortion ban "were contradicted by other doctors who testified" against the ban. *Carhart*, 550 U.S. at 162. As already explained, under *Casey*, no evidence is required at all. But even under heightened scrutiny, while the State often must have an evidentiary basis, it need not all point in the same direction.

This quantum of evidence is far more than required to satisfy intermediate scrutiny, whether the rule is characterized as substantial evidence, or any other formulation that occupies the middle ground between the strong basis required by strict scrutiny and the no-evidence standard under rational-basis review. Texas lawmakers had sufficient evidence to arrive at the conclusions leading to HB2.

C. Safeguarding women's health is a public interest that is more than important—it is compelling.

The rational-basis test defers to legislators regarding the legitimate interests lawmakers pursue in legislation. This deference extends so far that even when the government does not assert a legitimate interest, courts attempt to ascertain one. *See, e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726 (1963). Strict scrutiny, by contrast, is very demanding. *See, e.g.*, *Fisher*, 133 S. Ct. at 2419–21. Once again, intermediate scrutiny strikes a balance between the two.

This part of the intermediate-scrutiny analysis has already been settled by the Court. In *Simopoulos v. Virginia*, 462 U.S. 506 (1983), the Court held that States have a "compelling interest in protecting [a] woman's own health and safety." *Id.* at 519 (internal quotation marks omitted).

Texas's interest here in protecting women's health and safety—which as discussed in Part I, *supra*, and in Respondents' brief, is the reason HB2 was enacted—would therefore satisfy that half of the ends-means requirements even for *strict* scrutiny. It

therefore *a fortiori* easily satisfies intermediate scrutiny's requirements regarding the magnitude of public interest that the law must pursue to pass constitutional muster.

This would be true even under the more-demanding rule that preceded *Casey*. *Roe* held that the right to an abortion "is not unqualified and must be considered against important state interests in regulation." *Roe*, 410 U.S. at 154. The Court reasoned further:

> The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise.

Id. at 150.

The Court in *Roe* thus recognized a State's interest in protecting the health of the mother. *Id.* at 163–64. Subsequently the Court in *Casey* lowered the bar States must satisfy, and in *Simopoulos* made explicit that protecting women's health is a compelling interest. HB2 clearly meets intermediate scrutiny's requirement of an important public interest.

D. HB2 is substantially related to promoting women's health.

Texas satisfies the final element of intermediate scrutiny because HB2 is substantially related to promoting the governmental interest in women's

health. While strict scrutiny's narrow-tailoring prong requires that the state action must be "precisely tailored" to achieve the state interest, *Fisher*, 133 S. Ct. at 2417—not an exact fit, but very close—intermediate scrutiny is less demanding. "Under intermediate scrutiny, the government need not establish a close fit between the statute's means and its end, but it must at least establish a reasonable fit." *United States v. Skoien*, 587 F.3d 803, 805–06 (7th Cir. 2009) (emphasis omitted), *rev'd en banc on other grounds*, 614 F.3d 638 (7th Cir. 2010).

Once again, *Simopoulos* shows that Texas's actions here are constitutional. In *Simopoulos*, the Court upheld a Virginia statute restricting second-trimester abortions by requiring that such abortions could only be performed in hospitals or ambulatory surgical facilities (that is, ASCs). *Id.* at 517–19. Abortion restrictions at the time were controlled by *Roe*, which required abortion restrictions to satisfy strict scrutiny. Strict scrutiny's requirements regarding both the significance of the public interest pursued and the tailoring of the state action to achieve that interest completely subsume the ends-means elements of intermediate scrutiny. If Virginia's ASC requirement satisfied strict scrutiny, then the Court would have to overrule *Simopoulos* to hold that Texas's ASC requirement fails intermediate scrutiny.

Finally, the Court must conclude that HB2's admitting-privileges requirement is substantially related to promoting women's health. The American Medical Association clearly believed so in its statement cited above, as did the National Abortion Federation when it recommended abortion-providing physicians

should be able to maintain continuity of care via admitting privileges at a local hospital. However one characterizes the fit between an abortion patient's health and her abortion-providing doctor having the ability to remain closely involved in her care in the event of a medical emergency, providing her care that is uninterrupted and immediate, HB2's admitting-privileges requirement is substantially related to promoting such care.

CONCLUSION

"The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Casey*, 505 U.S. at 874. HB2 is such a law, and not any form of sex discrimination. The judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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